PD-0710-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/27/2017 8:26 AM
Accepted 11/27/2017 9:14 AM
DEANA WILLIAMSON
CLERK

NO. PD-0710-17

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/27/2017
DEANA WILLIAMSON, CLERK

ON APPEAL FROM THE COURT OF APPEALS FOR
THE NINTH DISTRICT OF TEXAS AT BEAUMONT

NO. 09-17-00038-CR

EX PARTE ELIZABETH ANN GARRELS

Arising from:

Cause No. 17-29859

IN THE COUNTY COURT AT LAW NUMBER FIVE,
MONTGOMERY COUNTY, TEXAS

STATE'S APPELLATE BRIEF

BRETT W. LIGON
District Attorney
Montgomery County, Texas

BRENT CHAPELL
Assistant District Attorney
Montgomery County, Texas
T.B.C. No. 24087284
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
brent.chapell@mctx.org

Oral Argument Permitted

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.2, the State hereby supplements the appellant's list of parties to this appeal with the names of all trial and appellate counsel for the State:

District Attorney:	**BRETT W. LIGON** District Attorney Montgomery County, Texas 207 W. Phillips, Second Floor Conroe, Texas 77301
Counsel for the State in the trial court:	**PHILIP S. HARRIS** **WESLEY LEROUAX** Assistant District Attorneys Montgomery County, Texas 207 W. Phillips, Second Floor Conroe, Texas 77301
Counsel for the State in the Ninth Court of Appeals:	**JASON LARMAN** Former Asst. District Attorney
Counsel for the State in this Court:	**BRENT CHAPELL** Assistant District Attorney Montgomery County, Texas 207 W. Phillips, Second Floor Conroe, Texas 77301

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The appellant was charged with the offense of driving while intoxicated (C.R. 4). The trial court declared a mistrial (C.R. 4). The appellant filed an application for a writ of habeas corpus claiming that double jeopardy barred her prosecution after the mistrial (C.R. 4–6). The trial court denied the application on the merits, and the appellant appealed (C.R. 89–91).

The Ninth Court of Appeals affirmed the trial court's ruling. *See Ex parte Garrels*, No. 09-17-00038-CR, 2017 WL 1953282 (Tex. App.—Beaumont May 10, 2017, pet. granted) (mem. op., not designated for publication). The court of appeals denied the appellant's motion for rehearing on June 6, 2017.

On August 23, 2017, this Court granted the appellant's petition for discretionary review.

STATEMENT OF FACTS

After a jury was impaneled and sworn, and during direct examination of the State's first witness, the appellant objected to certain expert testimony because the State had failed to give timely notice of the expert (1 R.R. 47–48). Over several pages of the record, the trial judge, defense counsel, and counsel for the State debated the appropriate remedy for a violation of article 39.14 (1 R.R. 48–60).[1]

[1] *See* Tex. Code Crim. Proc. Ann. art. 39.14(b) (West Supp. 2017).

The State sought a continuance so that the appellant could prepare for the expert, but the appellant objected to that remedy and instead sought exclusion of the expert testimony (1 R.R. 54–59).

After a break, the following colloquy ensued:

> THE COURT: Okay. I am either going to grant a mistrial with no prejudice, in which case we would start from scratch.
>
> [The appellant]: Sorry?
>
> THE COURT: I'm going to declare, not grant it, because no one's asked for one – either declare a mistrial on my own with no finding of bad faith, which would basically be the same as resetting but not with the same jury.
>
> [The State]: Judge, I don't think we can do that without a finding of manifest necessity.
>
> THE COURT: I'm not going to reset for however many days and have the six jurors come back.
>
> [The State]: We would be jeopardy barred, very likely, and in fact be a dismissal.
>
> THE COURT: You think that's true, even if –
>
> [The State]: Because the defense has not requested a mistrial. I believe that you need a manifest necessity to declare a mistrial. You are free to grant a mistrial, generally, but I believe that would bar us. If the defense wanted to request a mistrial in lieu of submitting the testimony, that would be different.
>
> THE COURT: Doesn't sound like that's what –
>
> [The State]: Correct. It's my understanding when the defense doesn't request a mistrial it needs to be due to manifest necessity.

THE COURT: That's a term I don't think I've looked the definition up.

[The State]: There are certain findings you have to make. I don't know what they are off the top of my head. I believe we could find it easily, but I doubt the situation would meet the general standard, but we could look it up if you need us to.

THE COURT: What is that language? Case or statutory?

[The State]: I believe it's a case. Judge, here's a Court of Criminal Appeals case from 1995 that talks about the factors you need to consider.

THE COURT: What's the cite?

[The State]: 907 southwest second 835 and it's *Brown v State*. This is a 1995 case, but these same factors come up again and again. I think we could easily find another one more recent, but with those factors it looks like you have to review the alternative course of action and choose the one, which in light of all the circumstances best preserves the defendant's right to have his trial completed before [a] particular tribunal.

THE COURT: Where is that?

[The State]: Section B. Right in that first paragraph under section B.

THE COURT: That's not the term that I would have used, but that's basically what I'm saying.

[The State]: Judge, I believe the proper procedure would be to make findings relevant to those factors. But I also, respectfully, would, urge the Court I don't believe – I believe less drastic measures would be admitting the evidence, excluding the evidence, or granting a continuance.

THE COURT: Right. So if the CCA was to find an abuse of discretion then they would be stuck in the same kind of pickle I am

because then they would say, well, we can't reverse it and order a new trial because the state has already prosecuted it.

[The State]: Wait.

THE COURT: If I granted a –

[The State]: A mistrial.

THE COURT: Right.

[The State]: I don't believe –

THE COURT: There wouldn't be anything to appeal, obviously.

[The State]: No, there wouldn't be. What would happen – there would be – we would try to refile the case. The defendant would file a motion for the double jeopardy grounds.

THE COURT: Then we'd be talking about this case.

[The State]: Correct.

THE COURT: All right. I'm just going to grant a mistrial on my own. Y'all can deal with it and decide what to do going forward. I think the short amount of time that he's had the discovery and the statute being pretty clear black lettering, I don't have any – legislature didn't give me any instruction and there [are] no cases that are new enough. I guess y'all will figure out what to do going forward.

[The State]: Judge, if you wanted to make some findings related to manifest necessity to see if that fits.

THE COURT: What I would say is during jury selection we told the jury we would be here Monday, Tuesday, Wednesday and not past that, and that they have the ability to pick between five different court dates to show up. So they were all expecting to have their jury service this week. They told me three days. They told me they didn't have any conflicts in those three days. Now, we're talking about

> having them coming back July 27th. Puts me on vacation before my kids go back to school or some other time after that. And I can't reset them to some other time after that. I would have to give them a specific set date. I don't think that's a reasonable or even remotely reasonable use of judicial resources. So I don't think that the alternative of admitting all the evidence would be fair, nor do I think it would survive an appeal, based on the fact that it's so defective time wise; three days as opposed to 20 days. So I don't feel like the Court has any other option at this point in time.
>
> [The State]: Thank you, Judge. Just to be clear the [S]tate, respectfully objects to the granting of a mistrial.
>
> THE COURT: Okay. All right.

(1 R.R. 61–65).

The appellant never expressly stated on the record that she did not consent to a mistrial, although her trial counsel provided in an affidavit accompanying the application for writ of habeas corpus—filed over six months after the trial court released the jury upon a mistrial—that *counsel* did not consent to the mistrial (Supp. C.R. 74). The trial court noted in the hearing on the appellant's application for writ of habeas corpus that "there was no objection by defense to the mistrial" (2 R.R. 11).

ISSUE FOR REVIEW

> Has a defendant who did not object to a trial court's declaration of mistrial, despite an adequate opportunity to do so, impliedly consented to the mistrial?

SUMMARY OF THE STATE'S ARGUMENT

Double jeopardy does not bar a subsequent prosecution after a mistrial if the defense consents to the mistrial. The appellant in this case impliedly consented to the mistrial by standing quietly and failing to raise any objection—or even the slightest concern—as the trial court contemplated a retrial after mistrial amid the State's express opposition to the mistrial.

ARGUMENTS AND AUTHORITIES

After jeopardy attaches—as it did in this case when the jury was empaneled and sworn—a defendant generally possesses a valued right to have her guilt or innocence determined before the first trier of fact. *Torres v. State*, 614 S.W.2d 436, 441 (Tex. Crim. App. 1981). So as a general rule, double jeopardy bars retrial if the jury is discharged after jeopardy attaches but before the jury reaches a verdict. *Ex parte Brown*, 907 S.W.2d 835, 839 (Tex. Crim. App. 1995). Exceptions to this rule exist if the defendant consents to a retrial or if manifest necessity mandates a retrial. *Id.*

A reviewing court evaluates a trial court's ruling on a double jeopardy claim in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). Because issues of consent are necessarily fact intensive, an appellate court must accept a trial court's finding unless it is clearly erroneous. *See Meekins*

v. State, 340 S.W.3d 545, 460 (Tex. Crim. App. 2011); *Ex parte Montano*, 451 S.W.3d 874, 877 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). When no written findings explain the factual basis for the trial court's ruling, the appellate court implies findings of fact that support the ruling so long as the evidence supports those implied findings. *See Meekins*, 340 S.W.3d at 460.

I. A defendant impliedly consents to a mistrial by failing to apprise the court that he opposes the mistrial.

Consent in this context need not be express; consent "may be implied from the totality of the circumstances attendant of a declaration of mistrial." *Torres*, 614 S.W.2d at 441 (citing *United States v. Gori*, 367 U.S. 364, 369 (1961)). "But before a failure to object constitutes an implied consent to a mistrial, a defendant must be given an adequate opportunity to object to the [mistrial]." *Id.* A defendant who does not object to the trial court's *sua sponte* declaration of mistrial, despite an adequate opportunity to do so, has impliedly consented to the mistrial. *Id.* at 441–42; *Montano*, 451 S.W.3d at 878.

Texas courts have consistently recited and applied this rule. *See, e.g.*, *Torres*, 614 S.W.2d at 441–42 (defendant did not impliedly consent to mistrial because he lacked adequate opportunity to object); *Montano*, 451 S.W.3d at 879–80 (defendant impliedly consented to mistrial by failing to object while trial court discussed reasoning for mistrial); *Ex parte Shields*, No. 10-09-00421-CR, 2010 WL 1509293, at *2 (Tex. App.—Waco Apr. 14, 2010, pet. ref'd) (mem. op., not

designated for publication) (defendant impliedly consented to mistrial by failing to object to State's motion despite having adequate opportunity to do so); *Ex parte Hervy*, No. 05-07-01713-CR, 2008 WL 625117, at *3 (Tex. App.—Dallas Mar. 10, 2008, pet. ref'd) (mem. op., not designated for publication) (State objected, but defendant did not, and therefore consented to a mistrial); *Ex parte Nichols*, No. 03-07-00021-CR, 2007 WL 2980187, at *5 (Tex. App.—Austin Oct. 11, 2007, pet. dism'd) (mem. op., not designated for publication) (defendant's express "neutral" position impliedly consented to mistrial); *Ex parte Kugley*, No. 14-95-00652-CR, 1996 WL 432291, at *3 (Tex. App.—Houston [14th Dist.] Aug. 1, 1996, no pet.) (mem. op., not designated for publication) (defendant's failure to object during consultation regarding potential mistrial constituted implied consent to mistrial); *Garner v. State*, 858 S.W.2d 656, 659 (Tex. App.—Fort Worth 1993, pet. ref'd) (defendant impliedly consented to mistrial by failing to object despite having opportunity to do so).

This rule is consistent with the rule that courts must consider the totality of the circumstances in determining whether a defendant consented to a mistrial, because a reviewing court must consider the context to determine whether the defendant opposed the mistrial. This Court's decision in *Ex parte Little* is instructive. *See Ex parte Little*, 887 S.W.2d 62 (Tex. Crim. App. 1994). The Court reviewed the lower court's conclusion that a defendant impliedly consented to a

mistrial because he failed to object after the trial court specifically asked for suggestions when contemplating whether to grant a mistrial on the basis of an absent juror. *See id.* at 65. The State indicated it did not oppose a mistrial; the defendant did not specifically object but responded that he would "be happy to sit here and wait and see if [the juror] shows up." *See Little v. State*, 853 S.W.2d 767, 768 (Tex. App.—Houston [14th Dist.] 1993), *rev'd*, *Ex parte Little*, 853 S.W.2d 62 (Tex. Crim. App. 1994). The court of appeals isolated this sentence and concluded that the defendant's failure to object constituted implied consent to the mistrial. *See Ex parte Little*, 887 S.W.2d at 65.

This Court held that the lower court's analysis was flawed because it ignored the exchange between the parties preceding and following the mistrial. *Id.* In the conversation following the mistrial, the defendant not only suggested waiting for the juror but also sought to make a record regarding the likely impact the poor weather had on the missing juror's unreliable method of transportation. *Id.* at 66. The defendant further contended that manifest necessity did not justify the mistrial, thus indicating that he felt a mistrial was inappropriate. *Id.* The Court noted that "an objection may be phrased in any manner which sufficiently apprises the trial judge and opposing counsel of the nature of the complaint." *Id.* at 65. So, based on the totality of the record, this Court concluded: "we cannot infer from the circumstances that [the defendant] consented to the mistrial because the record

plainly shows [the defendant] opposed declaring a mistrial due to the tardy juror." *Id.* at 66.

Thus, there is no *per se* rule that in every situation—no matter the context—a defendant's failure to expressly object constitutes consent to a mistrial. Rather, courts have consistently reasoned that, at a minimum, the record must show that a defendant opposed a mistrial before a trial court will have abused its discretion in finding that the defendant impliedly consented to a mistrial.

All of the cases upon relied upon by the appellant stand for the proposition that the record must indicate that, when given the opportunity, the defendant somehow opposed a mistrial before an appellate court will reverse the trial court's conclusion that a defendant impliedly consented to a mistrial. While an express objection is likely the best way to indicate opposition to a mistrial, courts have been willing to infer opposition based on context.

For example, courts will infer opposition to a mistrial when the defendant expressly indicates that he prefers the trial to proceed rather than end by mistrial. In *Torres*, for example, this Court considered whether a defendant impliedly consented to a mistrial by failing to expressly object to a mistrial where the trial judge contemplated a mistrial based on his belief that a witness was improperly intimidated. *See Torres*, 614 S.W.2d at 441–42. In that case, the judge questioned the defendant's attorneys about whether they wanted the defendant to be retried;

one attorney expressly stated he wanted to proceed with trial, and the other attorney was interrupted by the judge's impatient declaration of a mistrial while the attorney sought to first consult with his client. *See id.* at 442. Thus, because one attorney expressly indicated his intent to proceed with trial, and the other attorney lacked an adequate opportunity to object to the mistrial, this Court concluded that the defendant did not impliedly consent to the mistrial. *See id.*

One way a defendant can show he wants a trial to proceed is by offering an alternative remedy in response to the prospect of a mistrial. In *Pierson v. State*, the State conceded—and this Court agreed—that the defendant opposed a mistrial because, although the defendant did not say the words, "I object," he nevertheless argued that the mistrial-inducing question was permissible and, alternatively, asked whether an instruction could cure any error. *Pierson v. State*, 398 S.W.3d 406, 412 n.4 (Tex. App.—Texarkana 2013), *aff'd*, 426 S.W.3d 763 (Tex. Crim. App. 2014). The aforementioned *Little* exemplifies a similar circumstance involving an alternative suggestion. *See Ex parte Little*, 887 S.W.2d at 66.

Surely, one of the best indicators that a defendant did not oppose a mistrial is when a defendant has ample opportunity to object to the mistrial but fails to do so. This is especially true when the trial court indicates its intent to retry the case and the defendant still does not raise an objection. *See Harrison v. State*, 767 S.W.2d 803, 805–06 (Tex. Crim. App. 1989); *Montano*, 451 S.W.3d at 879–80. For

example, in *Harrison*, this Court considered whether a defendant consented to a *sua sponte* mistrial declared after defense counsel injected himself as a witness. *See Harrison*, 767 S.W.2d at 805. Considering that the trial court notified the parties of its intention to "declare the mistrial, and retry the case at another time," before bringing the jury in and dismissing them, the defendant impliedly consented to the mistrial by remaining silent. *See id.* at 805–06.

The lower court in this case utilized these concepts.

II. The court of appeals did not create a *per se* rule that fails to consider the totality of the circumstances in evaluating consent.

The appellant argues that the trial court erred by failing to consider the totality of the circumstances in evaluating whether she consented to the mistrial. According to the appellant, the trial court adopted a *per se* rule that a defendant impliedly consents to a mistrial by failing to object despite having an adequate opportunity to do so (Appellant's brief at 6–7).

But the words "*per se*" do not appear in the lower court's opinion, and the opinion says nothing to the effect that the failure to expressly object is the only factor to consider when determining whether a defendant consents to a mistrial. *See generally Garrels*, 2017 WL 1953282. Instead, the court of appeals offered a brief analysis in a relatively straightforward case.

Following this Court's direction from *Little*, the court of appeals considered the context of the grant of the mistrial. The lower court noted the genesis of the

discussion leading to the mistrial: the State's conceded discovery violation, the State's request for continuance as a remedy, and the appellant's opposition to the continuance and request for exclusion.[2] *See id.* at *1. The court further noted that the parties discussed the appropriate remedy for the discovery violation before the trial court *sua sponte* granted a mistrial. *Id.* The opinion also quoted the discussion between the trial judge and the prosecutor regarding the mistrial, including the State's express objection thereto. *Id.* The court could not quote the appellant because she was silent for the entirety of the discussion after the trial judge first uttered the word "mistrial." In its concise analysis, the court concluded that the appellant had an adequate opportunity to object but did not. *Id.* at *2. So the court followed the oft-cited rule that the appellant impliedly consented to the mistrial. *See id.*

Indeed, because the totality of the circumstances in the record supports the conclusion that the appellant impliedly consented to the mistrial, the court of appeals correctly held that the trial court did not abuse its discretion in denying the appellant's application for writ of habeas corpus.

[2] Notably, the court of appeals ably identified the appellant's opposition to the continuance despite her failure to expressly object thereto. *See Garrels*, 2017 WL 1953282, at *1.

III. The trial court did not abuse its discretion because the record supports its conclusion that the appellant did not oppose the mistrial.

Plainly, the appellant did not expressly object to the mistrial. And unlike *Torres*, the discussion of the mistrial in this case was protracted, so the appellant had ample opportunity to object to the mistrial. She has not argued otherwise.

Despite this opportunity, the appellant made no effort to apprise the trial court that she wished to be tried by a particular jury. When the trial judge first indicated he was considering a mistrial, he stated his intention to retry the case:

> THE COURT: Okay. I am either going to grant a mistrial with no prejudice, in which case we would start from scratch.
>
> [The appellant]: Sorry?
>
> THE COURT: I'm going to declare, not grant it, because no one's asked for one – either declare a mistrial on my own with no finding of bad faith, which would basically be the same as resetting but not with the same jury.

(1 R.R. 61). Over the next five pages of the record, the court contemplated whether it could declare a mistrial and still retry the case at a later date while the State sought to convince the court that it could not retry the case over a double jeopardy challenge (1 R.R. 61–65). Meanwhile, the appellant sat idly by and never suggested she opposed the mistrial (1 R.R. 61–65). And even when the trial court sought to justify retrial through manifest necessity, unlike the defendant in *Little*, the appellant did not question or express any dissatisfaction with the court's findings. (1 R.R. 61–65). Finally, when the State explicitly objected to the mistrial,

the appellant remained silent (1 R.R. 65). Such inaction over a lengthy discussion of the court's intent to retry the case is compelling evidence that the defendant impliedly consented to the mistrial. *See Ex parte Rothmeier*, No. 14-95-01356-CR, 1996 WL 491663 (Tex. App.—Houston [14th Dist.] Aug. 29, 1996, no pet.) (not designated for publication) (defendant impliedly consented to mistrial by standing silent while State objected to mistrial); *Ledesma v. State*, 993 S.W.2d 361, 365 (Tex. App.—Fort Worth 1999, pet. ref'd) (defendant impliedly consented to mistrial by failing to oppose finding of manifest necessity).

The appellant argues that the record shows she "wished to proceed with trial" (Appellant's brief at 11), but in reality, she wanted the trial to continue only if the trial court excluded the expert testimony. The appellant was not interested in having the same trier of fact determine her guilt or innocence because she expressly objected to the State's motion for continuance. Knowing that the State needed the expert testimony to prove its case, the appellant pursued the remedy she thought would result in her acquittal. And after the appellant learned that the trial court was considering a mistrial, she never again suggested that the trial court should exclude the testimony or exercise any alternative remedy. Instead, the appellant stood by quietly while the State fervently opposed the mistrial.

The appellant also argues that she would not benefit from a mistrial (Appellant's brief at 12). But at the time, the appellant *thought* she would benefit

because she could raise a claim of double jeopardy to bar further prosecution. Nothing else explains the appellant's inaction while the trial court weighed retrial and manifest necessity. If she were actually interested in preserving the right she now claims was violated—the right to a particular tribunal—she would have somehow voiced her opposition to the mistrial.

The appellant next argues that the State would benefit from a mistrial (Appellant's brief at 12). But the only way the State could possibly "benefit" from a mistrial is if the defense consented to the mistrial. The State clearly did not want a mistrial given its fervent opposition thereto, and the State had no reason to know that the appellant would not seek to exercise her right to be tried by the same jury.

The appellant further argues that "[b]oth the trial judge and the State understood [the appellant] did not want a mistrial" (Appellant's brief at 12). But the record indicates that the trial judge and the State understood that the appellant did not *request* a mistrial.[3] The facts indicating an affirmative request versus implied consent are markedly different, but either permits retrial.

Finally, the appellant argues that she did not expect to be retried (Appellant's brief at 12). The record plainly shows otherwise. The trial judge expressly

[3] Given the State's warnings to the trial court regarding the court's ability to retry the case absent defense request or manifest necessity, it appears that the prosecutor—at that time—was either unaware of the case law that permits a finding of implied consent by the defendant, or expected the defense at any moment to indicate their opposition to the mistrial.

indicated his intent to try the case again, and the appellant did not oppose that suggestion. And when the State warned the court that its effort to salvage the case by avoiding a finding of prejudice or bad faith would likely fail, the court found that manifest necessity warranted the mistrial—thus indicating that the trial court wanted to find a way to try the case again. The court even consulted case law to identify the factors necessary to find manifest necessity, all while the appellant did not object. This exchange gave express notice to the appellant that the State and the trial court planned for a new trial. Still, the appellant said nothing.

When faced with the prospect of a new trial, like in *Harrison* and *Montano*, the appellant's inaction was insufficient to apprise the trial court that she opposed a retrial and wished to preserve her right to be tried by the same jury. Unlike *Little* and *Pierson*, the appellant offered no alternative to the mistrial and never mentioned her desire to have the same jury determine her guilt or innocence. If the appellant had sufficiently informed the trial court that she sought to be tried by a particular tribunal, the trial court may have given further consideration to a less drastic alternative, such as a continuance. But the appellant's failure to so inform the court deprived the court of such knowing consideration.

Because the appellant impliedly consented to the mistrial, double jeopardy does not bar her subsequent prosecution. This Court should overrule the appellant's sole issue and affirm the court of appeals.

CONCLUSION AND PRAYER

It is respectfully submitted that all things are regular and the judgment of the court of appeals should be affirmed.

BRETT W. LIGON
District Attorney
Montgomery County, Texas

/s/ Brent Chapell
BRENT CHAPELL
T.B.C. No. 24087284
Assistant District Attorney
Montgomery County, Texas
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
936-788-8395 (FAX)
brent.chapell@mctx.org

CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Tex. R. App. P. 9.4(i)(2)(B) because there are 4,250 words in this document, excluding the portions of the document excepted from the word count under Rule 9(i)(1), as calculated by the Microsoft Word computer program used to prepare it.

/s/ Brent Chapell
BRENT CHAPELL
Assistant District Attorney
Montgomery County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served electronically on Mr. Matthew DeLuca, counsel for the appellant-petitioner, to the e-mail address of matt@mattdelucalaw.com, on the date of the submission of the original to the Clerk of this Court.

/s/ Brent Chapell
BRENT CHAPELL
Assistant District Attorney
Montgomery County, Texas